No. 20069

In the United States Court of Appeals for the Ninth Circuit

LOZANO ENTERPRISES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition to Review and Set Aside and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon a petition to review an order of the National Labor Relations Board (R. 74-75, 64-66),[1] issued against petitioner

[1] References to the pleadings, the decision and order of the Board, and other papers, reproduced as "Volume I, Pleadings," are designated "R." References to the stenographic transcript of record reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

on January 26, 1965, following proceedings under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).[2] In its answer the Board requests enforcement of its order.

The Board's decision and order are reported at 150 NLRB No. 123. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practice having occurred at petitioner's place of business in Los Angeles, California.

COUNTERSTATEMENT OF THE CASE

Briefly, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging employee Javier Martinez because of his union membership. The evidence on which this finding rests may be summarized as follows:

A. Foreman Laguna's dislike of the Union and his attempts to persuade Martinez to leave it

Petitioner is engaged in the publication, sale and distribution of *La Opinion*, a daily newspaper in the Spanish language (R. 54). Andres Laguna is in charge of its Linotype Department and in that position directs the work of the linotype operators, assigns overtime work and assigns shifts to employees in that department (R. 55-56; Tr. 148-150, 156-158, 310, 362).[3]

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[2] The pertinent provisions of the Act are set forth, *infra*, pp. 14-15.

[3] Laguna has also hired at least one employee (R. 56; Tr. 17-18).

Laguna has been strongly opposed to the Union [4] ever since its initial organizing campaign at petitioner's plant. See, *N.L.R.B.* v. *Lozano Enterprises*, 318 F. 2d 41, 42 (C.A. 9). Between April and November of 1961, Laguna had several conversations with employee Villasenor during which he told the latter not to join the Union because the employees would only be exploited. Laguna also told Villasenor that if he would leave the Union his salary would be raised to $2.50 per hour (R. 60; 318 F. 2d 41). Villasenor was discharged because he refused to abandon the Union. *Lozano Enterprises, supra.*[5]

In November 1963, Laguna told employee Juan Baltierra that Ocariz had some "infernal machinations," that Ocariz was nobody there at the plant, and that Baltierra, by paying attention to Ocariz, would go down in rank (R. 60; Tr. 119). Ocariz is an employee at petitioner's plant. He serves as chairman for the Union and collects the dues from petitioner's union members (R. 60; Tr. 119-120). Baltierra was a dues-paying member of the Union (R. 60; 120). In January 1964, Laguna told the newly-reinstated Villasenor that "if you yourself recognize that you work here and you live from what you earn here, you should be with the company" (R. 60; Tr. 160-162).

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[4] Los Angeles Typographical Union No. 174, affiliated with International Typographical Union, AFL-CIO.

[5] At the time of Villasenor's discharge, Laguna told a fellow employee: "Last Wednesday I fired Villasenor because in the office they don't want him here because he is one of the union leaders." *Lozano Enterprises, supra,* 318 F. 2d at 42.

Laguna also sought on several occasions to persuade employee Javier Martinez to leave the Union. In October 1962, Laguna told Martinez, "Javier, make up your mind to leave the union alone. Your future is here with us, with the firm. I can give you a lot of overtime just like I do with those that are on our side" (R. 60; Tr. 23-24). When Martinez replied that he was "with the other workers" (Tr. 24) Laguna told him, "Sooner or later you will change your mind" (Tr. 24). Later in that same year, Laguna told Martinez, "Javier, I notice that you have not made up your mind to leave the union. I see that you are still paying your dues" (R. 61; Tr. 25). Martinez admitted that he was still a member of the Union and Laguna replied, "You know best" (R. 61; Tr. 26). In March 1963, Laguna again told Martinez that he should leave the Union alone and that his future lay on the side of the Enterprise (R. 61; Tr. 285-287, 100).

B. Martinez is discharged

On June 8, 1963, this Court enforced an order of the Board requiring petitioner to reinstate former linotype operator Jose Villasenor, who had been discriminatorily discharged because of his adherence to the Union. *N.L.R.B.* v. *Lozano Enterprises*, 318 F. 2d 41, enforcing 137 NLRB 128. Petitioner customarily employs four linotype operators on its night shift, three on the day shift, and one who works weekends as well as substitutes for the regular linotypists (R. 56; Tr. 329). All these positions were filled at the time this Court ordered the reinstatement of Villa-

senor (R. 56; Tr. 368). Therefore, in order to comply with the Court's decree petitioner decided to terminate one of the linotype operators then in its employ (R. 56; Tr. 368).

Jesus Barunda, the substitute worker, had the least seniority among the linotypers, having been in petitioner's employ for only ten months (R. 56, 63; 369-370, 325). Arturo Duenas was next in point of least continuous service with the Company, having been employed to replace Villasenor in 1961. However, Duenas had previously been in the employ of petitioner from the latter part of the 1920's to 1957 (R. 56-57; 373, 390). The third lowest man in terms of seniority was Javier Martinez, who had been with the company since August of 1960 (R. 56; 8). Neither Barunda nor Duenas was a dues-paying member of the Union. Barunda had never joined the Union, and Duenas had discontinued paying his dues (R. 56; Tr. 199-200). Martinez, however, was a union member and, as detailed above, he had always rebuffed Laguna's attempts to get him to abandon the Union (*supra*, p. 4).

Martinez had been promoted from the position of substitute worker to full-time employment on the night shift in January 1963 (R. 63; Tr. 291, 329). The latter position carried with it a wage premium (R. 57; Tr. 406-407). Martinez was chosen for the regular, night position over Barunda, who was in petitioner's employ at the time (R. 58, 63; Tr. 369-70, 325).

Petitioner's attorney advised that the surest way to keep out of trouble in determining whom to discharge

to make room for Villasenor was to follow strict seniority (Tr. 366-367, 289-290). However, at a conference between Laguna, Publisher Lozano and General Manager Bravo, it was decided to terminate Martinez rather than Barunda, although the latter was the man with lowest seniority (R. 58; 372). This decision was reached primarily on the recommendation of Laguna (R. 58, 63; 370-372). On August 10, 1963, Martinez was discharged (R. 64; 10, 12).

THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act by selecting employee Javier Martinez for discharge because of his refusal to abandon the Union. Accordingly, the Board's order requires petitioner to cease and desist from the unfair labor practice found and from in any other manner impinging on employees' rights guaranteed by the Act. Affirmatively, the order requires petitioner to offer reinstatement to employee Martinez, to repay him, with interest, for his loss of wages resulting from the discrimination against him, and to post the customary notices (R. 64-67).

ARGUMENT

Substantial Evidence on the Record Considered As a Whole Supports the Board's Finding That Petitioner Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Martinez Because of His Union Membership

The sole question before this Court is a factual one —whether employee Martinez was discharged because

of his union adherence or because of his relative inferiority when compared with a fellow employee. Citation of cases in which the factual basis for a Board finding was insufficient (pet. br. pp. 5-7) is of no more aid in resolving this issue than would be citation of the numerous cases in which the Board finding was held to be supported by the record. Similarly unhelpful is the recitation (pet. br. p. 7) of the truism that mere membership in a union does not shield an employee from discharge for cause. It is equally true that the "existence of some justifiable ground for discharge is no defense if it was not the moving cause." *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457, 459-60 (C.A. 9); *N.L.R.B.* v. *Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9). See also, *N.L.R.B.* v. *Symons Mfg. Co.*, 328 F. 2d 835, 837 (C.A. 7).

What is relevant, although absent from petitioner's brief, is an analysis of the factual support in the record for the Board's finding in this case. As we demonstrate below, there is substantial evidence on the record as a whole to support the Board's finding that Martinez was selected for termination because of his unshakable adherence to the Union and that whether or not his conduct was inferior to another employee's, that inferiority was put forward by petitioner only to mask its illegal motives.

This record amply demonstrates that petitioner, and especially its supervisor, Laguna, has had a long and abiding dislike for the Union and the participation therein of its employees. The discriminatory discharge of employee Villasenor, *N.L.R.B.* v. *Lozano*

Enterprises, 318 F. 2d 41 (C.A. 9), is, of course, a prime illustration of this antiunion attitude. In addition, antiunion statements and illegal promises of benefits were uttered by Laguna as early as April 1961, while the Union was in the process of organizing respondent's plant. In November 1963, Laguna referred to the activities of the Union chairman as "infernal machinations" (Tr. 119), and warned an employee that he would go down in rank if he paid attention to the Union. As recently as January 1964, Laguna's hostility to the Union once again manifested itself. He warned the newly-reinstated Villasenor, already the victim of a discriminatory discharge, that "if you yourself recognize that you work here and you live from what you earn here, you should be with the Company" (Tr. 161-162).

On numerous occasions Laguna sought to persuade the discriminatee, Martinez, to abandon the Union. He emphasized that Martinez should leave the Union alone because his future lay with the Company. On one occasion Laguna went so far as to promise Martinez that he would be favored with overtime work if he left the Union alone.[6] On these occasions Martinez

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[6] Petitioner has abandoned its objection to the fact that the Trial Examiner credited Martinez's account of this episode whereas he had discredited Martinez's testimony on other matters. In any event, it is well-settled that the question of credibility of witnesses is for the Trial Examiner. *N.L.R.B.* v. *Lozano Enterprises*, 318 F. 2d 41, 43 (C.A. 9); *N.L.R.B.* v. *State Center Warehouse and Cold Storage Co.*, 193 F. 2d 156, 157 (C.A. 9). Moreover, as this Court has only recently observed: "The rule that a witness may be totally disbelieved if he is found to have testified falsely in any respect is not a

always remained firmly in the Union camp, stating that he was "with the other workers" (Tr. 24). Given Martinez' known, firm prounion attitude, Laguna's dislike of the Union, and management's previous attempt to rid itself of a union adherent, the Board was justified in finding that illegal considerations motivated petitioner to depart from strict seniority criteria to dismiss Martinez.[7]

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command. Witnesses are frequently demonstrably in error in parts of their testimony, but nevertheless believed by the trier of fact in other respects. It is just such judgments that the trier of fact must make." *N.L.R.B.* v. *Lozano Enterprises*, 327 F. 2d 814, 816, n. 2 (C.A. 9).

In view of the testimony of employees Baltierra and Villasenor that Laguna had made similar antiunion statements to them, the Trial Examiner's decision to credit Martinez in this respect was well within the wide scope of his authority in this area.

[7] Before the Board, but apparently not here, petitioner erroneously relied on Section 10(b) of the Act and *Local Lodge No. 1424, IAM* v. *N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411, for the proposition that the Board may not establish the true motive for discharge through any antiunion statements or activities which occurred more than six months prior to the filing of the instant charge.

Section 10(b) provides, in relevant part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and service of a copy thereof upon the person against whom such charge is made . . ."

The Board did not here seek to establish any of those statements or activities as themselves unfair labor practices. Rather, the Board used them only to "shed light on the true character of [the] matters occurring within the limitation period . . ." *Bryan, supra*, 362 U.S. at 416. Indeed, the Court in *Bryan* expressly distinguished situations such as the one here presented from the type of situation then before it. *Id.*, at

Petitioner's asserted reasons for departing from seniority are so inconsistent with the facts of this case as to provide further support for the Board's finding that these reasons were mere pretexts seized upon by petitioner to mask its illegal motivation. *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9); see also, *N.L.R.B.* v. *Sebastopol Apple Growers Union*, 269 F. 2d 705, 710 (C.A. 9). It is undisputed that petitioner placed great weight on seniority. Thus, in determining whom to lay off in order to make room for Villasenor, petitioner admits to relying *exclusively* on seniority in narrowing the choice down to Martinez and Barunda (pet. br. p. 7). Thus, petitioner admittedly did not compare the past conduct of all its employees. Seniority was strictly applied until all but the two men junior in point of service were left for considera-

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416-417. In *Bryan*, the only activity within the 10(b) period was the enforcement of a union security agreement, valid on its face; this activity, by itself, was innocent and could be impeached only by resorting to an event outside the limitations period, *i.e.*, by showing that the union lacked majority status when it entered the agreement. Here, however, the illegality, *i.e.*, Martinez's discharge, occurred within the six months period and the only use of anterior evidence is in establishing the existence of the present, independent violation. It has been uniformly held, both prior to the *Bryan* opinion (*N.L.R.B.* v. *General Shoe*, 192 F. 2d 504, 507 (C.A. 6), cert. denied, 343 U.S. 904; *Superior Engraving Co.* v. *N.L.R.B.*, 183 F. 2d 783, 791 (C.A. 7), cert. denied, 340 U.S. 930; *Paramount Cap Mfg. Corp.* v. *N.L.R.B.*, 260 F 2d 109, 112-113 (C.A. 8)), and subsequent thereto (*Sheet Metal Workers* v. *N.L.R.B.*, 293 F. 2d 141, 146-147 (C.A. D.C.), cert. denied, 368 U.S. 896; *N.L.R.B.* v *Food Fair Stores*, 307 F. 2d 3, 7, n. 4 (C.A. 3); *N.L.R.B.* v. *Craig-Botetourt Electric Cooperative*, 337 F. 2d 374, 375 (C.A. 4)), that Section 10(b) does not bar the consideration of such relevant evidence in this manner.

tion, and only then did petitioner allegedly feel the need to consider past misconduct as well.

Petitioner contends that it departed from seniority considerations and kept Barunda, who was not a member of the Union, rather than Martinez, who was, because the latter had been involved in certain incidents of misconduct in the past. However, at no time was Martinez in any way disciplined for any of these incidents.[8] Quite to the contrary, almost immediately after one of these incidents, Martinez was transferred to the night shift from the substitute position. Although petitioner contended before the Board that this was in no sense a promotion for Martinez, it is undisputed that employment on the night shift carried with it a wage premium which the other employees, including Barunda who was in petitioner's employ at the time, did not receive.

In sum, this is a case where petitioner has demonstrated its antagonism to the Union from the inception of the organizing campaign to the start of the hearing in this matter, where seniority was considered

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[8] Petitioner erroneously asserts, at numerous places in its brief (pet. br. pp. 2-3, 4, 6, 7), that the Board *found* that Barunda was a better employee than Martinez. What the Board found was that Barunda had engaged in fewer instances of objectionable conduct than had Martinez (R. 61-62). But the Board further found that petitioner did not consider Martinez's misconduct to be of such magnitude as to prejudice his transfer in January 1963 from substitute status to the more desirable status of a full-time linotype operator (R. 63; Tr. 291, 329); nor did petitioner feel that Martinez's misconduct was of sufficient weight to prevent it from reemploying him in February 1964, shortly after the complaint in this case issued (R. 7, 61; Tr. 382-384).

by petitioner to be a decisive factor in determining which employees to retain except where departure from this criterion afforded an opportunity to retain a nonunion man and discharge an individual unshakably committed to the Union, and where the reasons offered for this departure were reasons upon which petitioner itself did not place any importance either before or after the discharge. In these circumstances, the Board's finding that Martinez was discriminatorily discharged is amply supported in the evidence.[9]

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[9] Petitioner has abandoned the contention that Laguna is not a supervisor. In any event, this contention is wholly inconsistent with the concession made by the Company in the earlier litigation that Laguna was a supervisor. See Brief for Respondent, *N.L.R.B.* v. *Lozano Enterprises*, 318 F. 2d 41, at p. 9. Indeed, it was on the basis of that concession that this Court applied the rule that an employer is responsible for the unfair labor practices of a supervising employee and thus held the Company responsible for Laguna's actions. 318 F. 2d at 42-43. There is no evidence, nor does petitioner contend, that Laguna's duties at the time here relevant are any different than his duties at the time when he was concededly a supervisor. Quite to the contrary, the evidence in this record conclusively establishes that Laguna was and is a supervisor within the meaning of the Act. Thus, 11 employees are under Laguna's supervision—the seven linotype operators and five employees in the press room. The immediate foreman of the press room employees is under the supervision of and takes orders from Laguna. Laguna directs the work of the linotype operators, assigns overtime work and assigns shifts to the employees in the linotype department. He hired Martinez for the Company. The existence of these factors conclusively establishes that Laguna is substantially responsible for non-routine matters and was therefore a supervisor. *N.L.R.B.* v. *Fullerton Publishing Co.*, 283 F. 2d 545, 548-550 (C.A. 9); *N.L.R.B.* v. *Greenfield Components Corp.*, 317 F. 2d 85, 88 (C.A. 1); *N.L.R.B.* v. *Inland Corp. of Virginia*, 322 F. 2d

CONCLUSION

For the reasons stated, it is respectfully submitted hat the petition to review should be denied, and that decree should issue enforcing the Board's order in ull.

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December 1965.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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Assistant General Counsel
National Labor Relations Board

157, 460 (C.A. 4); *Berhardt Bros. Tugboat Service* v. *N.L.R.B.*, 328 F. 2d 757, 758 (C.A. 7); *N.L.R.B.* v. *Hamilton Plastic Molding Co.*, 312 F. 2d 723, 726-727 (C.A. 6).

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

Unfair Labor Practices

Sec. 8.(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;
>
> * * * *

Sec. 10 . . . (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No

objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

* * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

APPENDIX B

Pursuant to Rule 18(f) of the Rules of the Court

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Rec'd in Evidence
1(a) thru 1(h)	4	4	4
2	29	30	31
4 thru 7	181	181	182

RESPONDENT'S EXHIBITS

3	41	195	195
4	60	79	79

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